Nos. 05-5224 and 05-5705

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IN THE

Supreme Court of the United States

ADRIAN MARTELL DAVIS,

Petitioner,

—v.—

WASHINGTON,

Respondent.

HERSHEL HAMMON,

Petitioner,

—v.—

INDIANA,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF WASHINGTON AND INDIANA

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF WASHINGTON AND THE INDIANA CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU Women's Rights Project, founded in 1972, seeks to advance equality and justice for women and girls, including vigorous protection for women facing domestic abuse. The ACLU of Washington and the ACLU of Indiana are statewide affiliates of the ACLU.

The ACLU has a long-standing commitment to the fairness of criminal trials, including the right of the criminally accused to confront the witnesses against them. The ACLU accordingly appeared as *amicus curiae* in *Crawford v. Washington*, 541 U.S. 36 (2004), urging the reinvigoration of the Confrontation Clause that *Crawford* embraced. The ACLU also has a long-standing commitment to equal rights for women, which are endangered when the state fails to take appropriate action to punish and deter violence against women. In furtherance of that commitment, the ACLU recently appeared as *amicus curiae* in *Town of Castle Rock v. Gonzales*, ___ U.S. ___, 125 S.Ct. 2796 (2005), in support of a constitutional claim for damages filed by a woman whose three children were killed by her estranged husband after the police failed to enforce a protective order.

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* curiae states that no counsel for a party authored this brief in whole or in part and no person other than *amici* curiae, its members or its counsel made a monetary contribution to the preparation of this brief.

Lower courts have struggled in defining and applying the principles of *Crawford,* especially in domestic violence prosecutions, where pressure to rely on a victim's out-of-court statement is frequently enhanced by the fact that many victims of domestic violence are unable or unwilling to testify at trial. For reasons set forth below, we believe that a proper understanding of the Confrontation Clause requires reversal of the judgments in both *Hammon* and *Davis.* Respect for the Confrontation Clause, however, must not become an excuse for non-enforcement of domestic violence laws. Domestic violence remains a serious social problem that the state has a duty to address through constitutionally appropriate means, some of which are also discussed below.

The proper resolution of these cases is therefore a matter of significant interest to the ACLU and its members.

STATEMENT OF THE CASE

The cases before the Court involve two types of out-of-court statements routinely admitted in evidence-based domestic violence prosecutions – statements by victims to police officers responding to the scene of a domestic disturbance and statements to 911 operators describing a recent or contemporaneous act of violence.

In *Hammon*, police responded to a report of a domestic disturbance. On the scene, they interviewed Amy Hammon, who stated in response to police questioning that she had been assaulted by her husband Herschel. Officers gave her an affidavit to fill out and sign reciting her allegations. The state then charged Herschel Hammon with domestic battery. Amy Hammon did not appear as a witness at his bench trial, although she had been subpoenaed by the prosecution. In her absence, and over defendant's objection, one of the responding officers testified to Amy Hammon's

oral statements and her affidavit was admitted into evidence. This was the only evidence offered to prove the crime of domestic battery.

Herschel Hammon was tried before this Court decided *Crawford* and the trial court admitted the statements at issue under two hearsay exceptions. Following *Crawford,* the Supreme Court of Indiana ruled that Amy's oral statement was not testimonial within the meaning of *Crawford* and was thus properly admitted. It reached the opposite conclusion with regard to the written statement, but nevertheless concluded that its admission was harmless error because the case was tried before a judge rather than a jury. *Hammon v. State,* 829 N.E.2d 444, 457-59 (Ind. Sup.Ct. 2005). The court construed *Crawford* as requiring a subjective inquiry into whether either the questioner or the declarant was "principally motivated by a desire to preserve the statement" for potential use in future legal proceedings. *Id.* at 456.

In *Davis*, a caller dialed a 911 operator and hung up. The operator called back and spoke to Michelle McCottry, who stated in response to the operator's questions that she had been assaulted by her former boyfriend, Adrian Davis. McCottry did not testify at the subsequent trial for felony violation of a domestic no-contact order. Instead, the prosecution used portions of the recording of her conversation with the 911 operator as the only evidence identifying Davis as the assailant.

The Supreme Court of Washington first observed that *Crawford* requires an examination of "the circumstances of the 911 call in each case to determine whether the declarant knowingly provided the functional equivalent of testimony to a government agent." *State v. Davis,* 111 P.3d 844, 850 (Wash.Sup.Ct. 2005). It then held that "the portion of McCottry's 911 call that identified Davis as her assailant was

non-testimonial and properly admitted" because they were made as part of an ongoing emergency situation and there was no evidence that she intended her statements to be used for prosecution purposes. *Id.* at 851.

SUMMARY OF ARGUMENT

The present cases involve the relationship between two vital concerns. First, criminal trials must be conducted fairly and in accordance with the Sixth Amendment's Confrontation Clause. Second, violence against women, and domestic violence in particular, is a significant social problem that has too often failed to receive the attention it deserves from the criminal justice system. These concerns cannot and should not be treated as mutually incompatible. Victims of domestic violence have a right to expect that laws designed for their protection will be enforced against their abusers, and those accused of domestic violence have a right to cross-examine the witnesses against them in any criminal proceeding.

If the victim is willing to testify, the solution is simple. In many cases, however, domestic violence victims are unwilling to testify for various reasons, including the fear of further victimization. Many prosecutors in the past used that reluctance as an excuse to abandon prosecutions they were not enthusiastic about in the first instance. That, in turn, produced a public backlash that forced the law enforcement community to treat domestic violence more seriously. In response, prosecutors have increasingly sought to overcome the problem of reluctant domestic violence witnesses by employing what is sometimes called an "evidence-based prosecution" or "victimless prosecution," where the victim's out-of-court description of the crime is entered into evidence in lieu of live testimony from the

witness. Unfortunately, that has merely replaced one problem with another.

As this Court explained in *Crawford*, the Confrontation Clause prohibits the use of testimonial evidence that has not been subject to cross-examination even if there are indicia of reliability that would otherwise satisfy the rules of evidence governing hearsay. 541 U.S. at 62. That is because the Confrontation Clause serves a broader purpose than the hearsay rules. Among other things, the framers of the Constitution were well aware that the reliance on *ex parte* evidence undermines the credibility of the judicial process regardless of how reliable the evidence might be in particular cases. *See, e.g., Pointer v. Texas*, 380 U.S. 400, 404 (1965). By its very nature, such *ex parte* evidence is also more susceptible to manipulation. *See, e.g., Crawford*, 541 U.S. at 56 n.7.

In *Crawford* itself, there was little dispute that the challenged statement was in fact testimonial and thus no need for the Court to define the limits of that term with any precision. These cases arise in a context that has proven more vexing for the lower courts. In our view, the purposes of the Confrontation Clause are best served by an objective test that does not turn on the speaker's motivation but, rather, asks whether a reasonable person under the circumstances would have understood that any accusatory statements could be used for criminal investigation or prosecution. That is the test we proposed in *Crawford*, and we continue to believe it is correct. *See* 541 U.S. at 52.

Because neither court below applied this standard, neither judgment can be sustained. A strategy to address domestic violence cannot be premised on an end run around the Constitution. At the same time, compliance with the Constitution does not and cannot relieve government officials of their obligation to develop an effective response to

domestic violence. For example, experience has shown that domestic violence victims are more likely to testify if they have access to advocates who explain the process, help victims ensure their safety, and work with victims to deal with the legal, economic, and medical issues stemming from the violence. This is not surprising, but it is often overlooked.

ARGUMENT

I. OUT-OF-COURT STATEMENTS ARE "TESTIMONIAL" UNDER THE CONFRONTATION CLAUSE, AND THUS INADMISSIBLE, IF A REASONABLE PERSON UNDER THE CIRCUMSTANCES WOULD UNDERSTAND THAT THE STATEMENTS COULD BE USED FOR CRIMINAL INVESTIGATION OR PROSECUTION

The compact language of the Confrontation Clause -- "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him" -- serves many purposes. *See* Akhil Reed Amar, *Twenty-Fifth Annual Review of Criminal Procedure – Preface: Sixth Amendment First Principles*, 84 Geo. L.J. 641, 643, 689 (1996). A primary goal is to ensure that evidence against the accused is reliable. But an exclusive focus on confrontation as a mere proxy for quality of evidence led to the unpredictable and ultimately unworkable framework of *Ohio v. Roberts*, 448 U.S. 56 (1980), which linked Confrontation Clause analysis with hearsay rules of evidence in a manner that *Crawford* ultimately rejected. As confrontation law develops under *Crawford*, courts should not ignore these other values.

- The requirement of confrontation at trial affects law enforcement before trial, by removing an incentive for police to fabricate inculpatory out-of-court statements or to procure them through coercion or duress. The declarant's appearance for cross-examination "permits the uncovering and revealing of intentional or negligent governmental abuses in the creation of testimony, abuse that leaves the individual at the mercy of a vastly more powerful state and that may expose the innocent to conviction at the hands of vindictive or incompetent police or prosecutors." Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20-Sum. Crim. Just. 39, 41 (2005).

- At trial, confrontation is also a matter of simple fairness for the accused, giving defendants the best opportunity to mount their challenge to the state's best evidence. It has also been recognized since Biblical times that some form of structured face-to-face meeting between the accuser and the accused is at the core of justice. Confrontation thus has a moral component above and beyond its utility as a truth-finding mechanism. This is why the Sixth Amendment makes confrontation a "right" of the accused, and not merely a direction to the courts.

- Confrontation also has benefits after trial. By ensuring that the state brings its best evidence to trial, and by giving the defendant a fighting chance to contest it, public confidence in the trial's result is enhanced, no matter what the outcome. As with the right to trial by jury, "there are good political and symbolic reasons" to insist on confrontation during criminal trials; it too "promotes the perceived fairness

and legitimacy of the justice system." Taslitz, *What Remains of Reliability,* 20-Sum. Crim. Just.at 42,

Taking these and other values together, confrontation becomes more than just an evidentiary tool – it is a fundamental characteristic of the "way we do judicial business." Richard D. Friedman, *Confrontation: The Search for Basic Principles,* 86 Geo. L.J. 1011, 1028-29 (1998). The ACLU submits here, as it did in *Crawford*, that statements are testimonial -- and hence not admissible for the truth of the matter asserted in the absence of confrontation -- when they are made under circumstances in which a reasonable person would understand that the statements could be used for criminal investigation or prosecution.

The standard proposed by the ACLU is consistent with the text of the Confrontation Clause, which requires the production at trial of a "witness against" the accused. Whatever else might be encompassed in the term, it is certainly reasonable to conclude that one is acting as a "witness against" a person when one knowingly tells the police that the person has engaged in criminal activity, both because of the accusatory nature of the statement and because of the foreseeable likelihood that the statement will be used as the basis for further law enforcement activity. To be sure, many statements are made to police by persons who are not knowingly acting as witnesses against another, as when a conspirator makes a statement to an undercover officer in the conspiracy. *See Bourjaily v. United States,* 483 U.S. 171, 183-84 (1989). But the words "witness against" cannot be satisfactorily defined in any way that would exclude situations where a person knowingly delivers to the police an accusation that another person has committed a crime.

Focusing on a statement's content, rather than its form, is entirely consistent with *Crawford.* There, the Court

categorically rejected the notion that the Confrontation Clause only applies to in-court testimony. 541 U.S. at 50-51. It rejected the notion that a person is only acting as a "witness against" the accused when he gives a statement under oath. *Id.* at 52. It rejected the notion that a testimonial statement must be in writing. (Indeed, the excluded statements by Sylvia Crawford at the police station were oral.) And finally, *Crawford* was carefully written to allow for a more expansive definition of testimonial statements to develop in later cases. *Id.* at 68 (the Confrontation Clause "applies at a minimum to prior testimony [in a courtroom] and to police interrogations," but other statements may be testimonial as well).

The proposed test also furthers the interest in predictability articulated in *Crawford* because it is an objective inquiry. As such, it avoids the dangers inherent in allowing courts to resolve admissibility questions based on the type of subjective inquiries often permitted or required under hearsay law that the Court rejected as constitutionally infirm in *Crawford*. Under an objective inquiry, courts should not rely on a particular declarant's subjective reason for making a statement in determining whether it is testimonial. Thus, an objective inquiry will avoid the phenomenon, on full display in the present cases, of judges speculating about the state of mind of an absent person to determine his or her unspoken motivation for making an accusatory statement to the police. Such determinations, naturally, are unassailable precisely because the defendant cannot question the witness about the circumstances surrounding the statement. A test that requires a judge to divine an absent witness' subjective motivations will necessarily generate inconsistent results, as it did under the *Roberts* framework.

These and similar reasons have convinced many federal courts of appeals that the best measure of a testimonial statement under *Crawford* is whether a reasonable person in the declarant's circumstances would expect the statement to be the basis for further investigation or prosecution by law enforcement. *E.g., U.S. v. Hinton*, 423 F.3d 355, 359 (3rd Cir. 2005) (confrontation right applies to "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."); *U.S. v. Cromer*, 389 F.3d 662, 674 (6th Cir. 2004) ("Statements 'made to the authorities who will use them in investigating and prosecuting a crime, ... made with the full understanding that they will be so used,' are precisely the sort of accusatory statements the Confrontation Clause was designed to address") (citation omitted); *U.S. v. Saget*, 377 F.3d 223, 229 (2nd Cir.2004) ("the [Crawford] Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony.").

II. *HAMMON*: THE SIGNIFICANCE OF INTERROGATION

The fundamental mistake of the Indiana Supreme Court in *Hammon* was to assume that the examples of testimonial statements provided by *Crawford* (in-court testimony and police interrogations) constituted an exhaustive list that relieved it of any further obligation to assess whether the admission of Amy Hammon's statement was consistent with the underlying purposes of the Confrontation Clause. Based on that misunderstanding, the Indiana Supreme Court then focused its attention on whether the oral conversation between Amy Hammon and the police was an interrogation. The court concluded that it was not an interrogation because the officers' questions were not

"attempts by police to pin down and preserve statements" but instead were "efforts directed to determining whether an offense has occurred, protection of victims or others, or apprehension of a suspect." 829 N.E. 2d at 457. The court also considered it significant that Amy Hammon's "motivation was to convey basic facts," and that there was no "suggestion" that Amy intended her oral statements to be preserved or otherwise used against her husband. *Id.* at 458.

As an initial matter, the Indiana court relied on an inappropriately cramped notion of what constitutes an interrogation. *Crawford* made clear that its use of the term interrogation was not limited to the facts of that case (extended in-custody questioning of a potential suspect). Instead, the term is to be used in its "colloquial, rather than any technical legal, sense" for Confrontation Clause purposes. 541 U.S. at 53 n. 4. . *See also U.S. v. Baker*, 2005 WL 3369204 at *3 (11th Cir. 2005) (citations omitted) ("As the *Crawford* Court used the term 'interrogation' in the 'colloquial' and not 'technical legal' sense, statements given in a formal interrogation setting at a police station and witness statements given to an investigating police officer are both considered "testimonial'.").

The facts of *Hammon* clearly fit within the colloquial understanding of an interrogation. Upon arriving at her home, the police questioned Ms. Hammon about suspected criminal activity. 829 N.E.2d at 446-47. When she initially responded that nothing was the matter, the police investigated the scene and then returned and renewed their questioning as to what had occurred. *Id.* Upon this renewed questioning, she stated that her husband had assaulted her. At a minimum, repeated police questioning of a witness about a suspected crime constitutes interrogation under any reasonable definition of that term.

Moreover, if the difference between interrogation and other types of questioning hinges on particular indicia of formality, the Confrontation Clause inquiry can be easily manipulated by police, prosecutors, and the courts:

> If certain characteristics are deemed crucial for treating a statement as testimonial, then repeat players involved in the creation or receipt of prosecution evidence will have a strong incentive, and often ready means, to escape that treatment, simply by avoiding those characteristics. We have seen this already. Some courts have indicated that even if a statement made knowingly to the police accuses a person of a crime, it is not testimonial unless it is the product of a formal interrogation conducted after the police have determined that a crime has been committed. Some courts have held that, so long as the police can be deemed to have been assessing and securing the scene, even a statement making an express criminal accusation is not testimonial. As a result, we have seen police advised to try to secure accusatory statements before beginning what would necessarily be deemed a formal interrogation.

Richard D. Friedman, *Grappling with the Meaning of "Testimonial,"* 71 Brooklyn L.Rev. 241, 248-49 (2005); *see also* Robert P. Mosteller, *"Testimonial" and the Formalistic Definition – The Case for an "Accusatorial" Fix*, 20-Sum. Crim. Just. 14, 20 (2005) ("If the form of the statement is important to its testimonial nature ... then governmental officials who receive the statement can consciously manipulate those circumstances to exclude the statement from coverage."). As the Sixth Circuit recently observed: "If the judicial system only requires cross-examination when someone has formally served as a witness against a

defendant, then witnesses and those who deal with them will have every incentive to ensure that testimony is given informally." *U.S. v. Cromer*, 389 F.3d at 675.

More fundamentally, however, the Indiana court's focus on the term "interrogation" itself is misplaced. The better approach is not to debate the definition of "interrogation" (a word not found in the Confrontation Clause), but to focus on whether Amy Hammon was a "witness against" Herschel Hammon when she told police he had assaulted her. She plainly was, because a reasonable person in her situation would know that telling the police that Herschel assaulted her would almost certainly lead to further investigation and might well result in Herschel's arrest. Introduction of the statement at trial carries the same potential for law enforcement manipulation and untested accusation as the ex parte affidavits used against Sir Walter Raleigh. From the defendant's point of view, Amy Hammon's oral statement as recounted by the police is equally damning as the affidavit recounting the same facts that the Indiana court found itself bound to exclude. 829 N.E.2d at 458. Both are equally impossible to test before thefinder of fact.

By resolving *Hammon* with reference to the broader question, the Court can avoid the exercise of choosing among competing definitions of "interrogation." It would also avoid limiting the analysis to cases in which the statements to the police are in response to questioning. It is inevitable that there will be statements made to police officers at a crime scene that are volunteered or unsolicited. Answering only the narrow question of whether statements in response to police questioning constitute an "interrogation" will leave courts and litigants with no guidance as to other types of statements made to police investigating a crime, even where those statements are clearly accusatory. And, undoubtedly, it

will spawn a whole new round of litigation around the issue of when a particular statement is truly "in response" to an interrogation, as opposed to volunteered or unsolicited.

The role of the police in procuring the challenged statement is often relevant, but not dispositive to the Confrontation Clause analysis. For example, if Amy Hammon had written her statement on her own and delivered it to the police, the Confrontation Clause would still have barred its admission in court. On the other hand, *Crawford* understandably expressed a particular concern with government involvement in producing or eliciting an out-of-court statement, a concern the ACLU shares. *Id.* at 52 ("Police interrogations bear a striking resemblance to examinations by justices of the peace in England."); *Id.* at 53 ("The involvement of government officers in the production of testimonial evidence presents the same risk [as justices of the peace conducting examinations under the Marian statutes.") Police questioning is highly relevant to whether a declarant would reasonably understand that his or her statements would be available for later use in a criminal prosecution or investigation. Speakers reasonably understand that police are gathering evidence for prosecution when they question a person about a crime. Properly understood, therefore, the existence of police questioning is usually sufficient to establish that a statement is testimonial, but it is not necessary.

The objective standard focusing on a reasonable person's understanding offers multiple advantages over the test relied on by the *Hammon* court: it is simple, consistent with the constitutional language, resistant to word games, and does not hinge on speculative assumptions about subjective motivations of witnesses (the most important of whom was absent).

III. *DAVIS:* THE SPEAKER'S MOTIVATION AND DEMEANOR

Where the primary error in *Hammon* was its misplaced focus on whether the police questioning of Amy Hammon constituted "interrogation," the primary error in *Davis* was its misplaced focus on the subjective motivation and demeanor of the witness, Michelle McCottry. The Washington Supreme Court reasoned that statements within a 911 call should be classified according to whether they are a "cry for help to be rescued from peril" (nontestimonial) or whether they are "generated by a desire to bear witness" (testimonial), irrespective of whether the content of the cry for help also implicates the defendant in a crime. *See, e.g. State v. Davis*, 111 P.3d at 849. The court then characterized Ms. McCottry's statement as the former rather than the latter, in part because of "her crying and hysterical" demeanor. *Id.* at 850.

This approach undermines the purposes of the Confrontation Clause. From the perspective of the defendant whose confrontation right is at stake, it does not matter whether the witness against him is motivated by the specific subjective desire to have the statement be used in a later trial. *White v. Illinois*, 502 U.S. 346 (1992), properly rejected the suggestion that the Confrontation Clause would hinge on whether "the statement has been made for the *principal purpose* of accusing or incriminating the defendant." *Id.* at 352 (emphasis added).[2] So long as the declarant is narrating a description of the defendant's allegedly criminal behavior to the police or other law enforcement personnel (including 911 operators), the declarant is a "witness against" the

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[2] This aspect of *White's* holding was not called into question by *Crawford*.

accused. The testimonial nature of the statement should be tested by reference to how a reasonable person would expect the statement to be used.[3]

Of course, 911 service plays a dual role in our society – it can be both a mechanism to summon help in an emergency and a mechanism for reporting criminal activity. Furthermore, a single 911 call often invokes both roles. Under the objective standard proposed, however, statements made by during a 911 call describing criminal activity should be treated as "testimonial" for Confrontation Clause purposes in light of the common knowledge that 911 operators are affiliated with law enforcement, and that their job is to transmit information about criminal activity from the caller to the police.[4]

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[3] Other courts have gone farther than Washington to say that any statement that is an excited utterance is per se nontestimonial. *See, e.g., U.S. v. Brun*, 416 F.3d 703, 707-08 (8th Cir. 2005) (indicating that statement to 911 operator is nontestimonial when it is "emotional and spontaneous" and holding that statements to responding police officer were "excited utterances and thus nontestimonial statements"); *People v. Moscat*, 3 Misc. 3d 739, 746 (N.Y. Sup. Ct. 2004) (adopting a rule that 911 calls are not testimonial for the same reason that they are excited utterances—"because there has been no opportunity for the caller to reflect and falsify her (or his) account of events"); *People v. Corella*, 18 Cal. Rptr.3d 770, 776 (Cal. Ct. App. 2004) (stating that it is difficult to perceive any circumstances under which an excited utterance would be testimonial); *State v. Banks*, No. 03AP-1286, 2004 WL 2809070, at *3 (Ohio Ct. App. Dec. 7, 2004) (stating that *Crawford* does not apply to statement subject to common-law exceptions to the hearsay rule, such as excited utterance)

[4] In *Davis*, the state court brushed aside the argument that Ms. McCottry reasonably knew that her statements could be used to prosecute Mr. Davis because it is common knowledge that statements made in the course of a 911 call can be used prosecutorially with the observation that there was "no evidence that McCottry had such knowledge or that it influenced her decision to call 911." *Davis*, 111 P.3d at 850. It confidently concluded that, under the facts of the case, McCottry called 911 "because of an

In a given case, there may be some portions of 911 calls (or indeed portions of any out-of-court statement) that are not testimonial and can be introduced into evidence. This would include the portion of the call that is strictly a "cry for help" and does not describe another person's criminal activity. *See People v. West*, 823 N.E.2d 82, 91 (Ill. App. Ct. 2005) (finding statements to 911 operator describing nature of alleged attack, victim's medical needs, and victim's location to be nontestimonial, while statements describing assailants' vehicle and the direction in which they fled to be testimonial). Although this part of a call may be a small portion of the entire conversation, the fact that a person sought aid from 911 at a particular time will often be an important and relevant item of evidence for the prosecution.

The state court decisions in both *Davis* and *Hammon* illustrate the same tendency seen in many *Roberts*-era cases. When *Roberts* said out-of-court statements could be admitted into evidence without confrontation if they fell within a "firmly rooted" hearsay exception, courts were pressured to steadily expand these exceptions. *Davis* and *Hammon* illustrate the similar pressure on courts to expand the definition of "nontestimonial." To avoid this risk, courts should not pretend that a person is not a "witness against" another when making statements in circumstances where a

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immediate danger" and that there was "no evidence [she] sought to 'bear witness' in contemplation of legal proceedings." *Id.* at 851. The court did not explain how the defendant could have produced this evidence so long as Ms. McCottry was unavailable and could not be questioned regarding her motives and her understanding of how her statement might be used. This is similar to the *Hammon* court's finding with respect to Amy Hammon's oral statement that her "motivation was to convey basic facts and [there] was no suggestion that [she] wanted her initial response to be preserved or otherwise used against her husband at trial," even though she was unavailable and could not be questioned as to her motives. 829 N.E.2d at 458.

reasonable person would expect those statements to be used for criminal investigation or prosecution.

There may be room in Confrontation Clause jurisprudence for genuine exceptions to the confrontation rule. *See generally Mattox v. United States*, 156 U.S. 237, 243 (1895) (noting that in some instances exceptions to the Confrontation Clause may be appropriate when such exceptions were recognized at the time of its adoption). Indeed, *Crawford* notes that there may be an exception to the confrontation requirement for dying declarations. 541 U.S. at 56 n.6. It also reaffirms that the Confrontation Clause does not bar admission of statements made by witnesses whose unavailability arises from the defendant's own wrongdoing. *Id.* at 62. If this Court chooses to make an exception for accusatory statements made during exigent circumstance or as part of a cry for help, rather than asserting that such statements are nontestimonial, the more analytically justified approach would be to recognize such an exception explicitly and justify it in terms of the history and purposes of the Confrontation Clause. *See id.* at 58 n.8.

Absent such an exception, the reasoning and results in *Davis*, like those in *Hammon*, cannot be sustained.

IV. THE CONFRONTATION CLAUSE IS NOT INCOMPATIBLE WITH EFFECTIVE DOMESTIC VIOLENCE PROSECUTIONS

Just as the difficulties of prosecuting domestic violence cannot be an excuse for abandoning the Confrontation Clause, the requirements of the Confrontation Clause cannot and should not be seen as an insurmountable barrier to domestic violence prosecutions.

A. The Problem of Reluctant Witnesses

Prosecutors committed to trying domestic violence cases have tended to rely so heavily on victims' out-of-court statements because many forces discourage victims from testifying. According to some recent estimates, 80 to 90 percent of domestic violence victims whose abusers become involved with the criminal justice system recant or otherwise fail to assist the prosecution at some point in the proceedings. *See* Tom Lininger, *Prosecuting Batterers After Crawford*, 91 Va. L. Rev. 747, 768 n.103 (2005), Douglas E. Beloof & Joel Shapiro, *Let the Truth Be Told: Proposed Hearsay Exceptions to Admit Domestic Violence Victims' Out of Court Statements as Substantive Evidence*, 11 Colum. J. Gender & L. 1, 3 (2002).

Some victims do not cooperate with prosecutors because they fear retaliation by the defendant. That fear may be a reasonable projection from past conduct. In other instances there may be express threats of retaliation or actual retaliatory violence by the batterer. Indeed, data indicate that such threats and retaliation may occur in the majority of domestic violence prosecutions. *E.g.*, Lininger, *supra*, at 769; Laura Dugan *et al.*, *Exposure Reduction or Retaliation? The Effects of Domestic Violence Resources on Intimate Partner Homicide*, 37 Law & Soc'y Rev. 169, 179 (2003); Barbara Hart, *Battered Women and the Criminal Justice System*, 36 Am. Behavioral Scientist 624, 626 (1993); *see also* Deborah Epstein *et al.*, *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 Am. U.J. Gender Soc. Pol'y & L. 465, 476 & n.38 (2003) (describing study in which women identified fear of batterer as the number one reason why they were unwilling to cooperate with government). Battered women are at a heightened risk of violence at the moment they seek to separate from their

abusers; cooperation in criminal prosecution is often meant and understood as a means of formally separating from an abuser and thus presents increased danger to victims. *E.g.*, Dugan *et al.*, *supra*, at 174; Ronet Bachman & Linda E. Saltzman, U.S. Department of Justice, *Violence Against Women: Estimates from the Redesigned National Crime Victimization Survey* (1995); *see generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991) (explaining dynamics and prevalence of separation assault). As a result, many individuals who have experienced domestic violence quite reasonably conclude that criminal prosecution of their batterers will leave them less safe.

Others victims of domestic violence do not testify for other reasons, including: economic dependence on their batterer; concern that an immigrant batterer will be deported upon conviction; fear of an adverse reaction from family or community, who might regard a victim's participation in the prosecution as a betrayal; apprehension that involvement in the criminal justice system will lead to the loss of child custody to child protective services; or continuing emotional connections to their batterer. Epstein *et al.*, *supra*, at 477-82; Hart, *supra*, at 627-28. Victims of domestic violence, like other victims of crime, sometimes cease to cooperate in prosecution because of the time and effort that such cooperation entails. The difficulties presented by taking repeated time off work or repeatedly finding child care in order to participate in court proceedings, for instance, can impose significant barriers to participation, particularly to individuals who may be facing other crises in their lives as a result of the violence they have experienced. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J. L. & Feminism 3, 25 (1999); Hart, *supra*, at 628. Moreover, while attitudes are changing, battered

women too often are viewed by the criminal justice system as somehow responsible for the crimes against them, leading domestic violence victims to reject participation in criminal trials. *E.g.*, Hart, *supra*, at 626-27.

It is also important to recognize, however, that as with all crimes, some alleged victims refuse to testify because their initial accusations were untrue or exaggerated. For instance, batterers may falsely accuse their partners of abuse in an attempt to gain an upper hand in the relationship. *E.g.*, Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wis. L. Rev. 1657, 1692-93 (2004). Thus, the function of confrontation as a tool to vindicate the innocent has as much of a role in domestic violence prosecutions as in other criminal prosecutions.[5] Additionally, a fair trial with confrontation rights may itself heighten the deterrent effect of the criminal conviction by demonstrating the system's fairness to the accused. Individuals arrested for domestic violence may be less likely to engage in violence in the future when they believe that they were treated in a procedurally fair manner upon their arrest. See Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 Law and Soc'y Rev. 163, 165 (1997).

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[5] While a substantial majority of domestic violence prosecutions involve a man accused of harming a woman, it would be a mistake to think that only male defendants benefit from the right to confrontation. There are increasing numbers of prosecutions of women for domestic assaults on men, and jurisdictions with large gay populations have begun to bring domestic violence charges against men and women in same-sex relationships.

B. States Have A Variety of Available Tools To Facilitate Domestic Violence Prosecutions Without Sacrificing Confrontation Clause Values.

States have many tools available to address the reasons that domestic violence victims fail to testify and thus pursue domestic violence prosecutions consistent with the Confrontation Clause. Some data suggest that by using combinations of these techniques, victims will cooperate fully in a prosecution in sixty-five to ninety-five percent of cases. Angela Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 Fordham L. Rev. 853, 873 (1994).

First, victims who receive the services of a victim advocate are far more likely to assist with the prosecution of their abuser. Melanie Randall, *Domestic Violence and the Construction of 'Ideal Victims': Assaulted Women's "Image Problems" in Law*, St. Louis Univ. Pub. L. Rev. 107, 143 (2004) (battered women three times more likely to be willing to testify when they met with an advocate); *see also* Epstein, *supra*, at 20 (1999) (survivors able to access interpersonal support twice as likely to cooperate with prosecution). Advocates can work with victims to demystify the criminal process, address the range of needs created by the violence, help link victims to services, assist them with civil legal needs, and provide encouragement and support. *See, e.g.*, Sack, *supra*, at 1728-29 (2004). For instance, advocates canhelp address a victim's concerns that cooperation will endanger her by offering safety planning or assistance in obtaining a protective order. They might also assist a victim who is concerned about loss of a batterer's income by directing her to available benefits and explaining the application procedures for these benefits. Jurisdictions can

enhance domestic violence prosecution by providing these domestic violence advocacy services.

Second, jurisdictions can do more to make safety a reality for domestic violence victims. Increased resources to services for individuals seeking to escape domestic violence, including housing, job training, and the like, may also indirectly lead to greater victim cooperation in criminal prosecution by reducing the danger and cost of ending a violent relationship. *See generally supra* at 1735 (2004).

Third, some of the obstacles to testifying are the result of inefficiency within the criminal justice system. By coordinating the often separate fields of criminal prosecution and civil no-contact orders, prosecutors or criminal court judges can help victims maneuver within the legal system and reduce the frustration that leads to noncooperation. Epstein, *supra*, at 21-34; Sack, *supra*, at 1731-32. Women who have experienced domestic violence are also more likely to cooperate with prosecution when they are not implicitly or explicitly blamed for the violence against them by police, prosecutors, or judges. *See* Hart, *supra*, at 626.

Fourth, because victims' willingness to participate in criminal proceedings often diminishes over time, preserving testimony at an earlier stage may permit prosecutions to go forward that otherwise would have floundered on the lack of victim testimony. Lininger, *supra*, at 784-97.

Fifth, thorough police work may help ensure a successful prosecution even if the complaining witness does not testify. Under the *Roberts* rule, police had confidence that they could obtain a conviction with little more than a 911 tape, thus eliminating an incentive to pursue other leads that could help seal the case. To be sure, a large number of domestic assaults are witnessed only by the assailant and the victim. But in other cases there may often be other

witnesses, such the person(s)who first called the police in *Hammon*, or the other persons on the scene (children and the man named Mike) when the 911 call was made in *Davis*. It would be a mistake for the Court to believe that domestic violence can be prosecuted only through a relaxed approach to the Confrontation Clause.

C. The Fight Against Domestic Violence Should Not Be Measured Solely In Terms of Convictions

Some advocates have expressed concerns that application of *Crawford*'s rule to the kinds of statements at issue in these cases will lead police to ignore domestic violence calls, because they consider it pointless to intervene if the alleged perpetrator will not be convicted as a result of an arrest. Others suggest that the inadmissibility of these statements give batterers an even greater incentive to prevent victims from testifying. *Amici* fully agree that these are outcomes to avoid and believe jurisdictions should take steps such as those set out above to avoid this result. Moreover, whether a successful prosecution ultimately follows or not, police must continue to provide prompt emergency assistance in domestic violence cases to protect the health and safety of women and their families.

In addition, while domestic violence is a crime deserving vigorous enforcement and punishment, the number of defendants convicted is not the only, or even the most important, measure of success in the struggle against domestic violence. Helping domestic violence victims address their immediate needs for housing, financial support, physical safety, and the like indirectly increases the probability victims will cooperate with prosecution; far more importantly, however, such assistance directly increases the likelihood victims of violence will be able to end violent relationships and protect themselves in the long term. Safety

and autonomy for victims of violence is the ultimate goal of domestic violence policy. While criminal law enforcement is an important piece of such efforts, standing alone it cannot achieve these goals. Communities will be most successful in eradicating domestic violence when they mount a broad response to the problem.

CONCLUSION

For the reasons stated above, the judgments in *Davis* (05-5224) and *Hammon* (05-5705) should be reversed.

Respectfully submitted,

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